Filed 2/23/05 In re Richard G. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re RICHARD G., A Person Coming Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD G.,

Defendant and Appellant.
_____/

H026504

(Santa Clara County Superior Court No. J125855)

On May 16, 2003, the Santa Clara County District Attorney filed a petition under Welfare and Institutions Code section 602[1] alleging that Richard G., a minor, committed a second-degree burglary of a school cafeteria (Pen. Code, §§ 459-460, subd. (b)). Pursuant to the prosecutor's oral request on the date of the contested jurisdictional hearing, and over Richard's objection, the juvenile court allowed the prosecution to proceed both under section 602, which, in pertinent part, allows the juvenile court to "adjudge [the minor] to be a ward of the court" if the court has found

[1] Subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

that the minor "violate[d] any law of this state" (§ 602, subd. (a)), and under section 725, which allows the juvenile court to "adjudg[e] the minor a ward of the court" if the minor has failed "to comply with the conditions of probation imposed." (§ 725, subd. (a).) At the conclusion of the testimonial evidence on the alleged burglary, the prosecution elected to proceed under section 725. A few days later, the prosecutor introduced evidence unrelated to Richard's conduct during the cafeteria incident. After the juvenile court adjudged Richard a ward of the court under section 725, the prosecutor moved to dismiss the May 2003 section 602 petition. At the dispositional hearing, the juvenile court dismissed the section 602 petition as well as the section 300 dependency proceedings that had been pending involving Richard, declared Richard a ward of the court with a maximum term of six years and two months, and ordered Richard detained at Juvenile Hall until placement elsewhere.

On appeal Richard contends he was given inadequate notice that the proceedings before the juvenile court would be conducted under section 725, rather than under section 602. Richard also contends the trial court, at the section 725 hearing, erred by admitting inadmissible hearsay testimony and reports and by admitting his statements allegedly taken in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Assuming arguendo his counsel's objection to the admission of his statements in the patrol car was inadequate or that counsel's failure to object to the probation report was unjustified, Richard claims he was provided ineffective assistance of counsel.

I. Substantive Facts Underlying the School Cafeteria Incident

On the evening of Saturday, May 10, 2003, Alum Rock School District Buildings and Security Supervisor Ed Villa was alerted that there was a security problem with regard to the door and motion alarms at Cesar Chavez School. Police were at the school when Villa arrived. Although the cafeteria door "was ajar," Villa

testified nothing appeared to have been disturbed. Villa locked the doors and secured the building.

On Sunday afternoon, Villa received another call regarding the same cafeteria. When he arrived, the building was secure, and Villa did not "see anything out of the ordinary" when he opened the cafeteria and looked around.

On Monday evening, Villa received a call from the custodians of the same school. After they told Villa they had seen some "kids" running from the cafeteria and that the cafeteria wall had been damaged, Villa asked if they recognized the kids as going to Cesar Chavez School. When the custodians answered affirmatively, Villa advised them to contact the principal. Villa later contacted the police so that a report of the damage could be taken the following morning.

Early morning on Tuesday, May 13, 2003, Villa discovered a circular hole in the plaster of the cafeteria wall below an upper window and that a modem used by cafeteria staff for the food service had been knocked over. According to Villa, a female school cook informed him that some milk and "snack foods" were missing. When Officers Bryant Davis and Manuel Guerrero responded to the school, Villa told them the janitors had seen some people running away from the school on Monday, but no one gave the officers any specific information regarding "who was involved in the incident." At about 2 p.m. that afternoon, someone from the school called police to report "a suspicious person" on the playground. When Davis and Guerrero investigated, they found minor Richard G. "loitering around" on the school's playground. When they asked why Richard was not in school, he told them he did not attend Cesar Chavez Elementary, that he had been sent home from school, and that he had "wanted to come out and just walk around." The officers tried to take Richard home to his "guardian," but no one was there when they arrived at the home. While Richard was in the patrol car, Guerrero asked if Richard knew "anything that happened at the cafeteria." Richard replied, "How did you know I did that?" After that

exchange, Richard was admonished pursuant to *Miranda*. Richard said he understood his rights and then confessed to "going in, taking milk, cookies, [and] nutrition bars" from the cafeteria. Richard also identified two other minors who had participated in the burglary with him.

II. Procedural History

On January 3, 2003, the Santa Clara County District Attorney filed a petition under section 602 alleging that Richard G., a minor, committed two counts of felony first-degree burglaries of a dwelling (Pen. Code, §§ 459, 460, subd. (a)), two counts of misdemeanor battery (Pen. Code, §§ 242, 243, subd. (a)), and one count of attempted felony burglary of a vehicle. Richard admitted he had committed one count of first-degree burglary and one count of battery. On February 25, 2003, after the prosecutor dismissed the remaining counts, the juvenile court placed Richard on six months probation without a declaration of wardship pursuant to section 725. One condition of probation was that Richard had to obey all laws, and the juvenile court explicitly reminded Richard that he needed to obey that condition so "we don't declare that you are delinquent." In the spring of 2003, minor Richard G. still was on probation for the battery and the burglary. He was living in San Jose with a foster mother, having been taken into protective custody at age 12 after he was the victim of sexual and physical abuse at home.

On May 16, 2003, the district attorney filed a new section 602 petition, alleging, as amended, that between May 10 and May 12, 2003, Richard committed a second-degree felony burglary by entering a school with the intent to commit theft in violation of sections "459-460(b)" of the Penal Code. At the outset of the June 30, 2003 hearing on this section 602 petition, the district attorney said she also was asking for a finding of dissatisfaction with Richard's performance on probation under section 725 and for the court "to take wardship in the underlying case" on that basis.

At that point, Richard's counsel objected on due process grounds. He argued the "[i]ssue is, under the 725 statute, if counsel is alleging additional grounds for a violation of the six months without wardship, . . . the *Deon W*. case[2] indicates that we're entitled to notice as part of due process as to what those grounds are. [¶] . . . So I would object to, you know, on grounds of notice for the 725 petition. I'm not sure what counsel is alleging to be the, the violation here."

In response to Richard's notice objection, the district attorney told the court, "I don't know if [Richard's counsel] . . . thinks that I'm going to proceed on the, at least half a dozen write-ups that Richard has received in the hall since his arrest on this case, I don't plan to prove those this afternoon." The district attorney then stated that her "request pursuant to 725 is based exclusively on Richard's conduct with respect to the school cafeteria from May 10th through May 12th. And it is his conduct during that time, whether or not it rises to the level of a crime that be, be proven beyond a reasonable doubt, that I would be asking the court to take wardship pursuant to 725."

The prosecutor then answered in the affirmative when the juvenile court asked, "You're basing that on the same facts?"

Having heard the district attorney promise that she was relying upon the same facts to prove either the 602 petition which alleged a new crime or to prove a violation of probation under section 725, the juvenile court decided it was "proper to go forward at this time on the 725 and the [section 602] petition" with the understanding that the district attorney would elect one or the other at the conclusion of the evidence. After the conclusion of the testimonial evidence regarding the school cafeteria incident, the district attorney elected to proceed under section 725 and announced her intention to dismiss the section 602 petition.

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[2] *In re Deon W*. (1998) 64 Cal.App.4th 143.

After stating that the section 602 petition "will be dismissed," the juvenile court asked the prosecutor whether she was "going to present any other evidence on the 725 issue." She initially indicated she could present additional evidence if the court felt "it's necessary" but then said the prosecution had rested. At that point, Richard's counsel noted his "continued objection as to going forward on the 725."

The juvenile court then, over objection, permitted the prosecutor to discuss what might happen to Richard "dispositionally" assuming arguendo it would find a probation violation pursuant to section 725. After Richard's counsel argued the prosecutor had not met her "burden, even under section 725," and the prosecutor submitted the section 725 allegation for decision, the juvenile court said it was "still curious as to, if I do not sustain the 725 request, what is the status of Richard?"

The prosecutor did not answer the court's question. Instead, she said she would "encourage the court to make 725 findings based upon the totality of Richard's conduct," including the fact that he had "had to be physically restrained by four or more counselors in the Hall recently, and the other conduct which is violative of his terms of probation on the underlying first degree burglary."

The juvenile court next said it was "more concerned about the situation where if I do not sustain the 725, and quite frankly, at this point, I'm inclined not to sustain it. But in light of county counsel's current position, [Richard] cannot go back to the shelter." The prosecutor then clarified that "county counsel's position is that [it] is illegal to house people who are convicted delinquents with dependents."

The juvenile court decided to take the matter under submission until July 3, 2003 and to permit any new information to be heard at that time. The prosecutor then asked whether the juvenile court would take notice of the probation officer's report and all of the attached incident reports. After concluding the probation report with its attachments "qualifies as reasonable hearsay," the court said it would take notice of the report if offered. The last colloquy of the hearing follows: "[The prosecutor]: May the

court recognize that I am putting counsel on notice that I will be seeking to admit Probation Officer's Lopez' reports and attachments thereto on the 3rd. [¶] The Court: He's on notice. Thank you. [¶] [Richard's Counsel]: Thank you, Your Honor."

On July 3, 2003, the juvenile court admitted into evidence a letter from "MACSA" signed by Dimas Martinez, memorandums of June 24th, Dr. Langlois-Dul's report of June 20, a proposed plan in support of Richard's continuation in Program UPLIFT, an early disposition report of June 3, and a June 30 memorandum with various attachments regarding Richard's conduct in the hall.

The District Attorney then argued the court should hold that it is dissatisfied with Richard's performance under section 725 in order to take wardship of the case in which Richard was on probation without wardship because, "generally," Richard's "performance on probation since the end of February has been herendous *[sic]*." Specifically, apart from the school cafeteria incident originally filed as a section 602 petition, she argued Richard had (1) "acted out on a school bus" to the extent the driver stopped the bus and flagged down a police officer, (2) "attempted to break his lightswitch" in two rooms at Juvenile Hall, (3) "been assaultive and threatening in the hall" and that such behavior "caused general and specific disturbances," (4) "pinpointed" certain children in his unit and "caused disruptions . . . by calling them names and referencing their . . . alleged crimes," (5) "assaulted a counselor," (6) "proven that he can slip out of handcuffs," and (7) needed "to be restrained" and "moved to another secured safe room because he was acting out so much."

In deciding whether to find dissatisfaction with Richard's performance under section 725 such that Richard should be declared a section 602 ward, the juvenile court specifically stated that one of the things it found "most compelling" was "the review of the incident reports in the hall" because it found them "quite troubling." The second thing the court found "most compelling" was its comparison of the section 241.1 written protocol for Richard from four months earlier that recognized his recent bad

conduct but noted that he "deserve[d] another chance in the dependency system," which "he got," and the most recent section 241.1 report that discussed Richard's "continued spiralling *[sic]* conduct" and recommended Richard be made a section 602 ward. After reiterating that the report on the Juvenile Hall incidents and the report from the probation report were "the most important to the Court" in deciding the wardship question, the juvenile court ruled that, "based on that [section 725 evidence] and the evidence that I heard the other day [regarding the cafeteria incident], I am going to declare that [Richard] is a 602 ward."

At the dispositional hearing that ensued, the juvenile court dismissed the section 602 petition, found Robert had failed to comply with the terms of his probation, imposed wardship pursuant to section 725, and ordered Richard placed at Juvenile Hall until a suitable placement could be found.

III. Discussion

A. Lack of Notice of Intent to Consider Cafeteria Incident Under Section 725

Section 725 provides, in relevant part, that, "[i]f the court has found that the minor is a person described by Section 601 or 602 . . . it may, without adjudging the minor a ward of the court, place the minor on probation, under the supervision of the probation officer, for a period not to exceed six months. . . . If the minor fails to comply with the conditions of probation imposed, the court may order and adjudge the minor to be a ward of the court." Richard contends he is entitled to a reversal because he was denied the required written notice of the grounds upon which he was alleged to have violated his probation.

When a person under the age of 18 commits a crime, a section 602 petition seeks to bring him within the jurisdiction of the juvenile court, which may adjudge him a ward of the court. (§ 602.) Under section 725, the juvenile court has the option to impose up to six months' probation on a minor who falls within section 602 and

then to impose wardship "if the minor fails to comply with the conditions of probation imposed." (§ 725.) A section 725 proceeding is bifurcated into an evidentiary hearing to determine whether the minor violated probation and a disposition hearing to determine a suitable placement. (*In re Deon W.*, *supra*, 64 Cal.App.4th 143, 147.)

A section 602 petition only can be sustained on proof beyond a reasonable doubt supported by evidence that would be legally admissible in an adult criminal case. (§ 701.) Juvenile probation proceedings involve a preponderance of the evidence standard, and "reliable hearsay evidence" is admissible to the extent it would be admissible in an adult probation proceeding. (§ 777, subd. (c).)

The federal due process clause requires written notice of alleged probation violations. (*People v. Self* (1991) 233 Cal.App.3d 414, 419; *Black v. Romano* (1985) 471 U.S. 606, 611.) The People's claim to the contrary, the decision in *People v. Vickers* (1972) 8 Cal.3d 451, left no ambiguity as to whether written notice of all alleged violations is necessary in order for probation revocations to provide "equivalent due process safeguards" to those provided in the parole revocation context. (*People v. Vickers*, *supra*, 8 Cal.3d at p. 458.) Minors subject to section 725 proceedings are entitled to written notice of all of the allegations and are entitled to the same notice as adult probationers facing a revocation. (*In re Deon W.*, *supra*, 64 Cal.App.4th at p. 147.) The lack of written notice in this case constituted a violation of Richard's statutory and constitutional due process rights. (*In re Deon W.*, *supra*, 64 Cal.App.4th at p. 147; *People v. Self*, *supra*, 233 Cal.App.3d at p. 419; *Black v. Romano, supra*, 471 U.S. at p. 611.) Richard is correct that the due process requirement of written notice of alleged probation violations "does not include a loophole for 'actual' notice. (See *People v. Vickers*, *supra*, 8 Cal.3d 451.)"

Assuming arguendo that Richard's counsel was not required to seek a continuance in order to protect Richard's due process right to written notice of all of the allegations upon which it would rely in a section 725 proceeding, we next consider

whether the lack of written notice in this case was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also *In re Steven O*. (1991) 229 Cal.App.3d 46, 57 [applying *Chapman* standard of review to failure to provide notice of aggregation in a section 602 petition].)

On the day Richard's counsel learned the prosecutor would be permitted to proceed pursuant to both section 602 and section 725 regarding the school cafeteria incident, he made several appropriate section 725 hearsay objections to testimony given by the school's supervisor for building and security regarding information he had received from the custodians and the cook of the school. In particular, Richard's counsel argued that hearsay statements from the cook to supervisor Villas regarding the items that were missing from the cafeteria were inadmissible "under [section] 725." When the prosecutor countered that such evidence was admissible because it constituted "reliable hearsay" and it would be a waste of "time" and "resources" to call the custodians and the cook to prove the losses, Richard's counsel argued, pursuant to the section 725 proceeding, that it was not "a waste of time or resources" because "[t]he problem here is that this minor does not have an opportunity to cross-examine the person who this witness is, is quoting about things that are missing, how would he know things are missing. So, it's a matter of due process. And again, in terms of hearsay, I ask the court to look at *In re Kentron D*. 101 Cal.App.4th 1381 regarding hearsay and the 777 petition." Richard's counsel continued to make appropriate hearsay and foundation objections throughout the testimony of Officer Davis that same day, and several of those objections were sustained. Counsel then raised a timely *Miranda* objection when Davis testified to a statement made by Richard in response to a question while he was in the patrol car. When advised at the end of the day that the juvenile court intended to allow the prosecutor to admit the probation officer's report and all the incident reports attached to it when the hearing would reconvene three days later because it qualified as "reasonable hearsay" under section 725, Richard's counsel

did not seek a continuance or additional time to look at those reports or to prepare for cross-examination, presumably because he already had reviewed those documents. Therefore, when the court announced that Richard's counsel was now "on notice" that the prosecutor would be introducing that report and its attachments as evidence of Richard's misconduct at Juvenile Hall as part of the section 725 hearing, Richard's counsel simply said, "Thank you, your Honor." Three days later, the juvenile court recited which documents it would admit pursuant to sections 725 and 777 and then told Richard's counsel that "those are in evidence." Again, counsel did not indicate he was unfamiliar with those documents or that he needed time to prepare to challenge them. Instead, he discussed with the court the recent information he had received that would be relevant to disposition should Richard be found in violation of his probation and adjudged to be a ward of the court pursuant to section 725. Nothing in the record from the proceedings of June 3 suggests Richard's counsel was unfamiliar with the new evidence or issues presented under section 725 or that he was unprepared to argue effectively on Richard's behalf throughout the section 725 proceeding. After reviewing the entire proceedings held in this case, we conclude the error in failing to provide Richard with written notice of the alleged probation violations under section 725 was harmless beyond a reasonable doubt.

B. *Miranda* Issue

Richard next contends the juvenile court violated his federal constitutional rights under the *Miranda* decision by admitting his statements made to Officer Guerrero while Richard was in custody in the back of the patrol car.

Generally, a custodial confession obtained without warning a suspect of his right to remain silent and his right to counsel cannot be used against him. (*Miranda*, *supra*, 384 U.S. at pp. 478-479; Cal. Const., art. I, § 15.)

In the juvenile court, Richard sought to exclude the single statement he made before he received the *Miranda* warnings and the lengthier statement he made after the

Miranda warnings. As to the single pre-warning statement, "How did you know I did that," made in response to Officer Guerrero asking if Richard knew anything about the cafeteria burglary, defense counsel objected by saying, "Your Honor, I object as to *Miranda*, lack of foundation." When the prosecutor asked Officer Davis what Richard said after he was given the *Miranda* warnings, defense counsel objected on the ground that the prosecutor "needs to have the actual officer here who gave the *Miranda* warning and not just someone else who overheard it. I object, again, on lack of foundation, a violation of *Miranda*." When the juvenile court decided to admit defendant's statements "under 725, but not on the [section 602] petition," Richard's counsel objected based upon "*Miranda*, there is no hearsay exception in this case, so I make this a continuing objection." Officer Davis testified that Officer Guerrero read the *Miranda* warnings to Richard after the statement "How did you know I did that." Davis testified Richard made both that statement and his post-warnings statement admitting "to going in, taking milk, cookies, nutrition bars" with "some collaborators" while in the back of the patrol car in the front of his home while he was not free to leave because his guardian was not at home.[3]

1. Waiver

Relying upon *People v. Crowson* (1983) 33 Cal.3d 623, the People contend counsel did not object in the juvenile court on the specific grounds that he was not *Mirandized* before a custodial interrogation and that he did not knowingly waive his *Miranda* rights and that his failure to do so "should be construed as a forfeiture of this claim on appeal."

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[3] Richard's claim to the contrary, the record does not support an inference that his admission regarding taking the cookies, milk, and nutrition bars was made *before* the *Miranda* warnings were given by Officer Guerrero. Davis only testified to those admissions after he was asked whether, *after* Richard said he understood each of the *Miranda* warnings, "did you hear Richard participate in discussion about the school cafeteria?"

The *Crowson* Court held that "a *Miranda* claim may generally not be raised on appeal in the absence of a specific objection on that ground at trial. [Citations.]" (*Id.* at p. 628.)

We conclude the objections raised by Richard's counsel adequately advised the juvenile court that Richard was objecting that his pre- and post-warning statements were taken in violation of *Miranda*. Nothing more was necessary to preserve the *Miranda* issue on appeal.

2. Custodial Interrogation

The People next claim no *Miranda* warnings were required in this case because Richard was not "in custody." Comparing Richard's situation to cases in which officers conducting traffic stops are not required to give *Miranda* warnings to occupants of a vehicle before asking any questions (see, e.g., *People v. Hubbard* (1970) 9 Cal.App.3d 827), the People argue Richard was "under no more than a temporary restraint, which did not require a *Miranda* warning."

To the contrary, we conclude Richard was in a custodial setting when Officer Guerrero asked whether he knew anything about the recent cafeteria burglary. Officer Davis testified Richard was "not free to leave" and was "in custody" in the back of the patrol car because the police would not release him while his guardian was not at home, and the evidence reveals that Officer Guerrero was aware of the school cafeteria burglary and had picked Richard up because he had been loitering in the school playground. When Guerrero asked whether Richard knew about the cafeteria burglary, "a reasonable man in [Richard's] position would have understood his situation" to be one in which he was in custody. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442.)

We also conclude Officer Guerrero's first question to Richard constituted a custodial *interrogation*. *Miranda* warnings are required whenever a person in custody and the police officer should know that his questions are likely to elicit an

incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-302.) "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." (*Id*. at p. 301.) Furthermore, a "relatively innocuous question may, in light of the unusual susceptibility of a particular suspect, be reasonably likely to elicit an incriminating response." (*United States v. Booth* (9th Cir. 1981) 669 F.2d 1231, 1238.) Here, at the time Officer Guerrero asked whether Richard knew anything about what had happened at the cafeteria, Guerrero was aware the authorities at Cesar Chavez School recently had reported a burglary and that they had just called to report a suspicious person loitering in the playground. Guerrero had found Richard loitering at that school, and Richard already had told Guerrero that he did not go to Cesar Chavez, that he had been sent home from his own school, and that he instead had decided to just walk around in Cesar Chavez school playground. Guerrero also "recognized Richard from a previous arrest that he had on a burglary case" and "realized that Richard was on probation." Since Officer Guerrero knew Richard was not a student at Cesar Chavez and that he previously had been arrested for burglary, Guerrero would have known that Richard admitting *any* knowledge of the school cafeteria burglary would be an incriminating response and that the question posed was likely to elicit such an incriminating response. (*Rhode Island v. Innis*, *supra*, 446 U.S. at pp. 300-302.)

Accordingly, Richard's response to Officer Guerrero's first question was inadmissible since it was taken in violation of *Miranda*.

3. Admissibility of Richard's Statement Taken after *Miranda* Warnings

Richard next contends the mid-interrogation *Miranda* warnings were ineffective in his case and that, therefore, his post-warning statements were inadmissible.

In *Missouri v. Seibert* (2004) ___ U.S.___ [124 S.Ct. 2601] (*Seibert*), police questioned the defendant while she was under arrest for 30 to 40 minutes before she confessed. After a 20-minute break, she was given *Miranda* warnings and signed a waiver of rights. Confronted with her pre-warning statements, she confessed again. (*Seibert*, *supra*, 124 S.Ct. at p. 2613.) The officer who questioned the defendant testified during the suppression hearing that he had made a "'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught," namely, "question first, then give the warnings, and then repeat the question" until the defendant provides the answer he or she had "already provided once." (*Id*. at p. 2606.) The trial court suppressed the pre-warning statements but admitted the post-warning confession. (*Id*. a p. 2613.)

A plurality of the United States Supreme Court determined that a *Mirandized* "repeated statement" taken immediately after police first obtained an incriminating statement without giving *Miranda* warnings is inadmissible "[b]ecause this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda's* constitutional requirement." (*Seibert* at p. 2605.)[4] The *Seibert* plurality reasoned that "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." (*Id*. at p. 2610.) The plurality continued with its analysis as follows: "The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. Could the warnings

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[4] Justice Breyer wrote a concurring opinion in which he joined the plurality opinion "in full" but clarified that he considered the opinion to incorporate a "fruit of the poisonous tree" approach to the issue of admissibility of the second statement after "the initial unwarned questioning." (*Seibert*, *supra*, at pp. 2613-2614, conc. opn. of Breyer, J.)

effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who had just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment." (*Ibid*., fn. omitted.)" Under the plurality approach, circumstances to be considered include "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." (*Id*. at p. 2612.)

In *Seibert*, the People relied upon the fact that "a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy" had been held admissible in *Oregon v. Elstad* (1985) 470 U.S. 298 (*Elstad*). (*Seibert*, *supra*, 124 S.Ct. at p. 2611.) In *Elstad*, a teenaged suspect made incriminating statements in response to questions asked by an officer during a "brief stop" in the boy's living room while another officer was explaining the charges to the suspect's mother in the kitchen. (*Elstad*, *supra*, 470 U.S. at p. 315.) The suspect later was taken to the police station and systematically interrogated after *Miranda* warnings were given. (*Id*. at pp. 314-316.)

In distinguishing the outcome in *Elstad* from that in *Seibert*, the *Seibert* plurality observed that the *Elstad* court had "noted that the pause in the living room 'was not to interrogate the suspect but to notify his mother of the reason for his arrest,' [citation], and described the incident as having 'none of the earmarks of coercion,' [citation]. The Court, indeed, took care to mention that the officer's initial failure to warn was an 'oversight' that 'may have been the result of confusion as to whether the

brief exchange qualified as "custodial interrogation" or . . . may simply have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent's mother.' [Citation.]" (*Seibert*, *supra*, 124 S.Ct. at p. 2611.) The *Seibert* plurality explained that, in *Elstad*, at "a later and systematic station house interrogation going well beyond the scope of the laconic prior admission, the suspect was given *Miranda* warnings and made a full confession." (*Id*. at pp. 2611-2612.) It noted that, "[i]n *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission." (*Seibert*, *supra*, at p. 2612.) The *Seibert* plurality pointed out that in "holding the second statement admissible and voluntary, *Elstad* rejected the 'cat out of the bag' theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda*, determined the character of the later, warned confession." (*Ibid*.) The *Seibert* plurality noted that the *Elstad* "Court thought any causal connection between the first and second responses to the police was 'speculative and attenuated.' [citation.] Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally." (*Ibid*.)

The *Seibert* plurality noted that, by contrast, the police strategy in the case before it was adapted to undermine the *Miranda* warnings. The unwarned interrogation was "systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20

minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way [the officer] set the scene by saying 'we've been talking for a little while about what happened on Wednesday the twelfth haven't we?' . . . The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk." (*Seibert*, *supra*, 124 S.Ct. at pp. 2612-2613, fns. omitted.)

In a concurring opinion, Justice Kennedy set forth a narrower test: "If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made." (*Seibert*, *supra*, 124 S.Ct. at p. 2616 (conc. opn. of Kennedy, J.).) Examples of curative measures include "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning," and "an additional warning that explains the likely inadmissibility of the prewarning custodial statement." (*Ibid*.) Since Justice Kennedy "supplied the fifth

vote in [*Seibert*], and concurred on grounds narrower than those put forth by the plurality, [his] position is controlling." (*Romano v. Oklahoma* (1994) 512 U.S. 1, 9.)

As noted above, before advising Richard of the *Miranda* warnings, Officer Guerrero simply asked Richard if he knew "anything that happened at the cafeteria." Richard replied, "How did you know I did that?" Immediately after Richard had admitted having participated in the cafeteria burglary, Guerrero gave Richard the *Miranda* warnings. Richard said he "understood each of those rights" and then admitted "taking milk, cookies, [and] nutrition bars." He also told Guerrero there were "some collaborators who were involved in the incident." After Richard said one went to Cesar Chavez School and another lived near the school, Richard then was taken to the school where he identified a juvenile collaborator in his classroom.

The first question we must consider is whether the police employed a "*deliberate* two-step strategy." (*Seibert*, *supra*, 124 S.Ct. at p. 2616 (conc. opn. of Kennedy, J.), italics added.) The answer in this case is no. The record does not indicate that Officer Guerrero used a "deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview" (*id*. at p. 2615) when he simply asked if Richard knew "anything that had happened at the cafeteria." As Justice Kennedy noted, "[I]t would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." (*Ibid*.)

Since we conclude Richard's postwarning confession was not inadmissible under *Siebert*, *Elstad* continues to govern the admissibility of that postwarning statement. Under *Elstad*, while it is true that Richard was in police custody in the back of the patrol car when he made his unwarned statement, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a

voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." (*Elstad*, *supra*, 470 U.S. at p. 314.) Here, we find that the subsequent administration of the *Miranda* warnings did suffice to remove the conditions that precluded admission of Richard's earlier statement. After Richard made his unwarned statement, Officer Guerrero immediately read him the *Miranda* warnings. Richard stated that he understood his rights and then confessed to taking milk and cookies from the school cafeteria. There is no indication that Officer Guerrero used coercive or improper tactics in obtaining the initial single prewarning statement or that, after giving the *Miranda* warnings, he confronted Richard with his prewarning statement in order to obtain the confession. Instead, the record suggests Richard merely reiterated his earlier prewarning statement, adding only the nature of the items he had taken from the cafeteria.

In his reply brief, Richard argues that, "[u]nder the totality of the circumstances in the present case, Guerrero's pro forma questioning was insufficient to establish that a boy of [his] age, mental health status and background actually understood the nature of the rights he was waiving." In turn, he contends the record does not establish that his "waiver was knowingly, voluntarily, or intelligently made. [Citation.]"

"The state must demonstrate the voluntariness of a confession by a preponderance of the evidence. [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) The state must also demonstrate that the individual who confesses has made a knowing and intelligent waiver of his rights that are set forth in the *Miranda* admonitions. (*Ibid*.)

In order to determine the validity of the waiver of a juvenile, courts must evaluate the juvenile's "age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare v. Michael C*. (1979) 442 U.S. 707, 725.) By deciding to admit Richard's pre- and post-

Miranda admissions, the juvenile court made an implied finding that both statements were voluntary and that the latter followed a knowing and intelligent waiver.

After reviewing the record, we conclude that a preponderance of the evidence establishes the Richard's post-*Miranda* admission was voluntary as well as knowing and intelligent. Although Richard was only 13 years old at the time in question, he had had prior experience with law enforcement, he was evaluated to have average academic abilities for someone his age, and he was not upset or crying while seated in the back of the patrol car. Richard calmly listened to the *Miranda* admonitions and affirmatively said that he understood them. "Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine* (1986) 475 U.S. 412, 422-423.)

In light of the above, we conclude Richard's post-*Miranda* statements were properly admitted into evidence.

C. Admissibility of Hearsay Testimony

Richard contends the juvenile court erred by admitting the school building school supervisor's hearsay statement that the school cook had reported that food was missing from the cafeteria.

As noted above, section 725 provides that, if a minor had been found to be a person described by sections 601 or 602 and has been placed on probation without having been adjudged a ward of the court, the court subsequently may adjudge the minor to be a ward of the court if the minor has failed "to comply with the conditions of probation imposed." While section 725 fails to set forth specific rules regarding admissibility of hearsay in section 725 probation revocation hearings, we agree with the People that "section 777 is instructive in its procedures for modifying existing orders of the court with respect to delinquent juveniles." In that regard, we note that a

juvenile court "may admit and consider reliable hearsay evidence at [a section 777] hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in *People v. Brown*, 215 Cal.App.3d (1989) and any other relevant provision of law." (§ 777. subd. (c).)

In *People v. Brown*, *supra,* 215 Cal.App.3d at pp. 454-455, the court held that, although "relaxed rules of evidence" govern probation revocation proceedings, a court is not permitted '"to admit unsubstantiated or unreliable evidence as substantive evidence . . . ."' [Citations.] [¶] As long as hearsay bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding. [Citations.] In general, the court will find hearsay evidence trustworthy when there are sufficient 'indicia of reliability.' Such a determination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. [Citation.]"

In *Morrissey v. Brewer* (1972) 408 U.S. 471, the United States Supreme Court defined minimum levels of due process in the context of parole revocation hearings, and the *Morrissey* rights later were extended to probationers facing revocation. (*Gagnon v. Scarpeli* (1973) 411 U.S. 778.) One *Morrissey* right is the "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)" (*Morrissey v. Brewer*, *supra*, 408 U.S. at p. 489), and our state supreme court has determined that reliable hearsay may be admitted under *Morrissey* when good cause is shown. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1159-1160.) Good cause, which includes the unavailability of a witness, great difficulty or expense in bringing in a witness to testify, or when there is a risk of harm to the witness, is balanced with other circumstances relevant to the issue, including "the purpose for which the evidence is offered," its significance "to a factual determination relevant to a finding of violation of probation," whether other

admissible evidence "corroborates the [proferred evidence], or whether, instead, [it] constitutes the sole evidence establishing a violation of probation." (*Id*. at p. 1160.)

Here, when defense counsel raised a hearsay objection to the juvenile court admitting the school security supervisor's testimony regard the school cook's statement to him that food was missing from the cafeteria, the prosecutor argued that the supervisor was "the authority figure for the Alum Rock School District" and that "[i]t would be not only a waste of time, but also a waste of resources and unnecessary to call in the chefs and the janitorial men and women in order to prove specifically the losses when it was their duty to report to this man so that he can then report to the police for all sorts of professional purposes."

We conclude the juvenile court did not abuse its discretion in finding the proferred testimony admissible on the section 725 petition. Here, where Richard had admitted to the police that he had taken items from the cafeteria and where no actual taking is necessary to prove a burglary since intent to commit theft can be "inferred from the forcible and unlawful entry alone" (*People v. Fitch* (1946) 73 Cal.App.2d 825, 827), good cause was shown by the expense and inconvenience the school district would suffer in order to bring in the school cook to testify regarding an uncontested and relatively insignificant matter, namely, that food was discovered missing after the cafeteria break-in. Having found that the showing of good cause outbalanced the significance of the proferred evidence, we conclude Richard's due process rights were not infringed by the juvenile court's decision to admit the reliable hearsay testimony.

In any event, since admissible evidence was presented that Richard confessed to illegally entering the school cafeteria and taking away milk, cookies and nutritional bars, the supervisor's testimony regarding the school chef's statement was cumulative. Accordingly, any error in admitting the supervisor's hearsay testimony regarding the school cook's out-of-court statement was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

D. Reliability of Hearsay in the Probation Report and Its Attachments

Richard contends "the probation officer's report of June 30, 2003 and attached memoranda and incident reports constituted unreliable hearsay, and their admission violated [his] state and federal due process rights." (Emphasis and capitalization omitted.)

After school supervisor Ed Villa and Officer Davis concluded their testimony at the jurisdictional hearing, the juvenile court asked if the prosecutor had additional evidence to present on either the section 602 or 725 petition. In response, the prosecutor indicated she had no additional witnesses and that she had elected to proceed under section 725. Both sides rested and argued the probation violation matter. When defense counsel objected to the prosecutor's argument that Richard required more services from probation, the prosecutor acknowledged her argument was "premature" since the juvenile court was considering the jurisdictional question at that point. After further argument on the probation violation, the issue was submitted. The juvenile court and counsel next discussed the implications should the court sustain the section 725 petition, and the court indicated that it would welcome "any new information" on the issue of placement on the date set for announcement of its decision. The prosecutor then asked whether the court would take notice of the probation officer's report and all of the attached incident reports. The juvenile court replied, "Well, I think that certainly qualifies as reasonable hearsay, so I will if its offered." The prosecutor then asked, "May the court recognize that I am putting counsel on notice that I will be seeking to admit probation officer[] Lopez' reports and attachments thereto on the 3rd." The court answered, "He's on notice. Thank you." Without objection, Richard's counsel merely said, "Thank you, your honor." Court then adjourned.

On July 3, 2003, the juvenile court listed the documents provided by the prosecution. They included a letter from the Mexican American Community Services

Agency, a June 24 memorandum, a June 20 report from Dr. Langlois-Dul, a proposed support plan from Program UPLIFT, an early disposition report for June 3, and a June 30 memorandum with several attachments that discussed Richard's behavior in juvenile hall. All of these documents were admitted into evidence without any objection from defense counsel.

In deciding to declare Richard a section 602 ward of the court under the section 725 petition, the juvenile court commented that Richard "is kind of in a downward spiral right now and he needs some help to get out of it. . . . I think he is a good kid, but he is not acting like a good kid right now." The court then noted that it found "a couple of things most compelling . . . . First of all, the review of the incident reports in the hall are *[sic]* quite troubling." [¶] Secondly, I . . . reviewed and compared the 241.1 report that was filed in this case almost exactly four months apart on the one that was assigned January 30. They talked about their concern and his most recent bad conduct. But he deserves another chance in the dependency system. And he got it. And then four months later on May 28, Michelle Jackson who [defense counsel] mentioned and -- Grace Jimenez talked about continued spiralling conduct. And then they recommended that [Richard] be made a [section] 602 ward. So those two documents are the most important to the Court."

We initially agree with the People that defendant forfeited his right to appeal that admission of the challenged documents in the probation officer's report by failing to object below when he had the opportunity to do so both when he was put on notice that the prosecutor intended to introduce those documents and later when the prosecutor proceeded to admit them during the proceedings of July 3, 2003. (*People v. Scott* (1994) 9 Cal.4th 331, 351.)

However, assuming arguendo the juvenile court erred by admitting the documentary evidence proferred by the prosecution on July 3, 2003, any such error was harmless under either the state or federal standard of review (*People v. Watson*

(1956) 46 Cal.2d 818, 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) After mentioning the challenged documentary evidence, the juvenile court concluded, "And based on that and the evidence that I heard the other day, I am going to declare that [Richard] is a [section] 602 ward." The prosecutor did not allege any of the violations at juvenile hall as part of the section 725 petition requesting that Richard be adjudged a section 602 ward of the court. Rather, she chose to prove the violation of probation based solely upon the alleged cafeteria burglary. In that context, evidence of Richard's poor behavior in juvenile hall was irrelevant to the underlying section 725 probation violation based upon the burglary of the school cafeteria. Accordingly, we agree with the People that, although the juvenile court stated that two of the challenged documents were important to its decision, "[h]ad the [juvenile] court not considered the documentary evidence, it still would have found the minor in violation of his probation based on the testimony regarding the cafeteria burglary."

E. Ineffective Assistance of Counsel

Richard claims his counsel provided ineffective assistance by failing to object to the admission of his statement in the patrol car and by failing to object to the admission of the probation officer's report.

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings. [Citations.]" (*People v. Price* (1991) 1 Cal.4th 324, 440.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

Having determined that Richard's postwarning statement in the patrol car was admissible and that there was no reasonable probability that the juvenile court would not have adjudged Richard to be a section 612 ward of the court in the absence of the probation report, we conclude that Richard's ineffective assistance claims are not well taken. (*People v. Price*, *supra*, 1 Cal.4th at p. 440.)

IV. Disposition

The order under review is affirmed.

_____
Mihara, J.

We concur:

_____
Bamattre-Manoukian, Acting P.J.

_____
McAdams, J.